SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973
No. 731345

JOSEPHINE GABALDON, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONERS.

JONATHAN C. GIBSON,
707 Broadway, Suite 1212,
San Diego, Calif. 92101,
(714) 236-1255,

REX H. REED,
1990 M Street, N.W., Suite 100,
Washington, D.C. 20036,

JOHN L. KILCULLEN,
1747 Pennsylvania Avenue, N.W.,
Washington, D.C. 20006,

RICHARD B. ISHAM,
1441 South Mooney Blvd., Suite D,
Visalia, Calif. 92377,

Counsel for Petitioners.

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REPLY BRIEF OF PETITIONERS.

I

California Action in Authorizing and Fostering Union Shop Constitutes Governmental Action.

Respondents contend that California maintains a policy of neutrality in labor relations and that its legislature and Supreme Court have done no more than to uphold the validity of the union shop. They thus seek to uphold the decision of the Court of Appeal that the position of the state is one of benign neutrality towards the union shop, one of passivity toward the arrangement, one of absence of regulation. All of this is in flat contradiction to what the Supreme Court of the state had some years before held in sustaining the validity of the union shop. In so holding, it had expressly based its decisions on the ground that the union shop is authorized, permitted, encouraged and protected under the statutes of the State. Those statutes must be read as the

highest court of the State has construed them. So read they inescapably constitute state action in favor of the union shop under the unbroken line of decisions of this Court holding that state action is present where the state authorizes and encourages a particular form of private contract or conduct. This Court specifically held in *Railway Employees Dept. AFL v. Hanson*, 351 U.S. 225, 232 (1956) that a statute authorizing a union shop agreement between private parties constitutes governmental action.

The respondents invoke the erroneous application of the court below of the decision of this Court in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 165 (1972) to the facts of the case at bar. In so doing they fail to observe the critical distinction between general state regulation of all or part of the business of a private person or corporation on the one hand and the specific authorization, encouragement and protection of the particular conduct which is the subject matter of complaint on the other hand. The principal question in *Moose Lodge* was whether the strict general regulation by the state of the sale of alcoholic beverages by the club constituted state action in compelling or authorizing racial discrimination in the service of food and drinks on the club premises.

The Court held that the general regulation of the club's sale of alcoholic beverages did not constitute state action on the subject of racial discrimination because it was not directed to and did not in any way foster and encourage such discrimination, saying in part:

> "However detailed this regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." (407 U.S. at 176, 177).

In the case at bar, the Supreme Court of California has not only held that the statutes of the state foster and encourage the union shop, but also that they permit and authorize the arrangement. What California has done amounted to State action because it was directed to the specific cause of complaint.

II

Case Here Raises Constitutional Questions of the Utmost Gravity Reserved in Previous Decisions of This Court.

Respondents contend that on the merits this case is governed by *Railway Employees Dept. AFL v. Hanson, supra,* 351 U.S. 225 (1956) which upheld a union shop against an attack upon its constitutionality. But the union shop there was very different from the one involved here, since it required no more than that the employee compensate the union for its services as collective bargaining representative. Quite true, the arrangement was, as here, subjected to attack for violation of a broad range of liberties protected by the First and Fifth Amendments. Thus the Court said:

> "Wide-ranged problems are tendered under the First Amendment. It is argued that the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights. It is said that once a man becomes a member of these unions he is subject to vast disciplinary control and that by force of the federal Act unions now can make him conform to their ideology." (351 U.S. at 236, 237).

The Court held that those questions were not involved in the agreement then before it merely requiring compensation to the union for its services, but would be decided when they arose, saying:

> "If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case. For we pass narrowly on §2 Eleventh of the Railway Labor Act. We only hold that the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments. We express no opinion on the use of other conditions to secure or maintain membership in a labor organization operating under a union or closed shop agreement." (351 U.S. 238.)

Subsequently, in *International Machinists v. Street*, 367 U.S. 740 (1961), a group of employees sued alleging that the money they were compelled to pay to hold their jobs was used in substantial part for political and ideological purposes in violation of the Bill of Rights. The defendant unions, like the respondents here, argued that the claims made had been rejected in the decision of this Court in *Hanson*. This Court rejected that defense holding:

> "Thus all that was held in Hanson was that §2, Eleventh was constitutional in its bare authorization of union-shop contracts requiring workers to give 'financial support' to unions legally author-

> ized to act as their collective bargaining agents * * * Clearly we passed *neither upon forced association in any other aspect* nor upon the issue of the use of exacted money for political causes which were opposed by the employees." (367 U.S. at 749) (Emphasis added.)

The court in *Street* then went on to say that the question regarding the use of forcibly exacted funds for political purposes had been reserved in *Hanson*, and that the issues there reserved are of the utmost gravity. The Court said:

> "The record in this case is adequate squarely to present the constitutional question reserved in Hanson. These are questions of the utmost gravity." (*Id.*)

The Court concluded, however, that it was unnecessary to decide the constitutional issues in *Street* because the use of the dues of the employees for politics over their objection was contrary to the statute. The broad constitutional questions going beyond the forced exaction of money for the support of the union and the use of that money for politics and consisting of the other things done pursuant to a full union shop agreement by forcing men into ideological associations which violate their right to freedom of conscience, freedom of association and freedom of thought protected by the Bill of Rights, and subjecting them to vast disciplinary control, which were reserved both in *Hanson* and *Street*, are presented for determination in the case at bar.

The respondents contend that the union shop in the case at bar merely requires association of the employee with the majority of his company workers (OB 6).

But the complaint here alleges, as stated by the Court below, that the union does not "represent a 'majority or substantial portion of the agricultural workers' " (A-2)—a fact that illumines the reason for the power given by the agreement to the minority union to procure the discharge of any worker for anti-union activity—the raw power to intimidate and subdue the majority. Again as stated by the Court below, "membership in defendant union is a condition of employment * * * employees * * * must become members * * * within seven days * * * or suffer termination." (A-2). There being no qualification of this requirement, but only further provisions for augmentation of union power over the workers, the agreement clearly calls for a full union shop which coupled, as here, with a hiring hall, is almost a closed shop—the harshest type of compulsory union membership.

The complaint further alleges, as stated by the court below, "that as a consequence of the enforcement of the agreement plaintiffs and members of the class have been threatened with discharge, have in fact been discharged, demoted, subjected to job classification, discrimination, transfer, and have been refused employment." (A-4). The allegations of the complaint regarding an agreement for an unrestricted union shop requiring membership in a private organization as a condition of employment in violation of the constitutional rights of petitioners are sufficient as a short and plain statement of the claim giving the respondents fair notice of the claim upon which it rests. It entitles them to a hearing on the merits, *Conley v. Gibson*, 355 U.S. 41, 48 (1957), which have been denied to them by the California courts.

Conclusion.

It is respectfully submitted that a writ of certiorari should be issued as prayed for in the petition so that there may be review of the grave constitutional questions regarding compulsory union membership expressly reserved by this Court in *Hanson* and *Street*.

Dated: April 15, 1974.

Respectfully submitted,

JONATHAN C. GIBSON,
REX H. REED,
JOHN L. KILCULLEN,
RICHARD B. ISHAM,
Counsel for Petitioners.